Supreme Court, U. S.
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MICHAEL RODAK, JR., CLE

IN THE

SUPREME COURT OF THE UNITED STATES
October Term, 1973

No. **73-1550**

FLORYE M. HEARD,

PETITIONER,

v.

THE AMERICAN UNIVERSITY,
A Corporation

RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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IN THE

SUPREME COURT OF THE UNITED STATES

No.

FLORYE M. HEARD,

PETITIONER,

v.

THE AMERICAN UNIVERSITY,
A Corporation

RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Your Petitioner, Florye M. Heard, respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, entered in the Case of Florye M. Heard v. The American University on December 10, 1973.

OPINIONS BELOW

The judgment of the United States Court of Appeals for the District of Columbia Circuit denying your Petitioner's appeal to that court (infra, Appendix A) and its order denying her Petition for Rehearing (infra, Appendix B), which were handed down on December 10, 1973 and January ~~14~~, 1974, respectively, have not been reported. The order of the United States District Court for the District of Columbia granting summary judgment in favor of Respondent (infra, Appendix C) has also not been reported.

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit denying Petitioner's appeal from an order of the United States District Court for the District of Columbia granting summary judgment in favor of Respondent, was entered on December 10, 1973. A timely Petition for Rehearing filed by Petitioner was denied by an order entered on January ~~14~~, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

Whether the United States Court of Appeals for the District of Columbia Circuit in affirming summary judgment granted by the District Court in favor of Respondent (1) erroneously and in contravention of Rule 8(f) of the Federal Rules of Civil Procedure construed Petitioner's Complaint, which alleged that Respondent

University acted in an arbitrary, capricious and biased manner in refusing to award a Masters Degree to Petitioner, as not encompassing discrimination based upon sex; and correspondingly erroneously approved the District Court's refusal to compel Respondent to comply with Petitioner's request for production of documents directed toward discovery of evidence of discrimination based upon sex; and (2) erroneously approved the action of the District Court in resolving disputed issues of fact concerning whether or not the action of Respondent University was arbitrary, capricious and biased in favor of Respondent on a motion for summary judgment, and, based on the findings of fact so made, decided that Respondent was entitled to judgment as a matter of law.

STATUTES INVOLVED

No statutes, regulations or constitutional provisions are directly involved.

STATEMENT OF THE CASE

In 1961 Petitioner applied for and was granted admission to the Respondent University's Graduate School of Government and Public Administration, having previously been awarded a Bachelor of Science Degree in Public Administration by the University on June 5, 1960. Due to an error on the part of the University, Petitioner's original application stated that her course of study was for a degree of Master of Arts in Government, when in fact from the outset the course of study was for a degree of Master of Arts in

Public Administration. This error was officially corrected by the University in 1966. Also in 1966 Petitioner was advanced officially to candidacy for the degree of Master of Arts in Public Administration.

Pursuant to the rules of the University, Petitioner was required, as a prerequisite to entitlement to the degree, to complete a total of thirty (30) credit hours of graduate work, with a grade average of "B" or better, inclusive of a research requirement and thesis of six (6) credit hours. During the period of 1961 through 1967 Petitioner undertook, and completed with a grade average of better than "B" all assigned instruction courses.

Petitioner commenced research, analysis and preparation of her thesis in the Spring of 1964. The manuscript was completed in August of 1968. Petitioner's thesis is entitled "Employment Practices Relating To Women In Industry" and is an analytical inquiry into employment practices in industry which discriminate against women seeking higher level positions. The thesis was submitted to Charles H. Goodman, Professor at the Respondent University, under whose direction and supervision the thesis was prepared, on August 26, 1968. On October 1, 1968, a copy of the thesis was submitted to Dean Earl H. DeLong, School of Government and Public Administration, the Respondent University. DeLong and Goodman acknowledged that the thesis was of a satisfactory caliber to satisfy the Respondent University's thesis requirement.

All of the foregoing graduate work was undertaken by Petitioner through attendance at courses conducted at night,

due to Petitioner's daytime employment with the U. S. Department of Health, Education and Welfare.

In addition to completion of thirty (30) credit hours of graduate study (including the thesis), the Respondent University's rules in effect in 1967 required that Petitioner submit to two (2) written comprehensive examinations as a prerequisite to entitlement to the Degree of Master of Arts in Public Administration. The two (2) comprehensive examinations required of Petitioner were in two (2) fields which were:

54.061: Management of the Governmental Administrative Establishment
54.064: Governmental Financial Policy and Program.

Pursuant to the rules of the Respondent University, each comprehensive examination paper written by a candidate was to be read and graded by two readers. In order to pass the examination, the candidate must obtain a grade of satisfactory from both readers in each of the fields in which the candidate is examined.

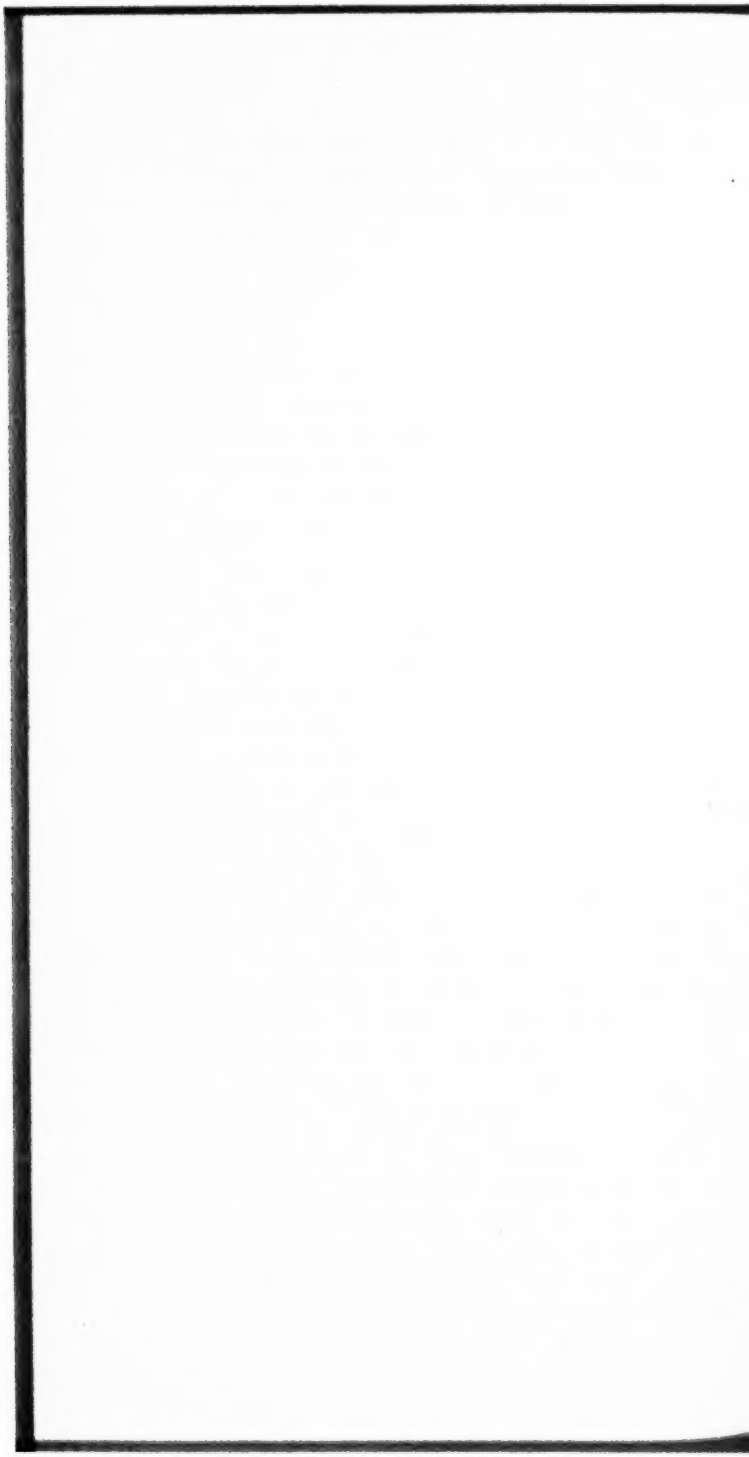
Petitioner submitted to the two comprehensive examination, in writing, as specified. The two readers assigned to grade her paper in Comprehensive Field No. 54.064 graded it "satisfactory". Both readers of her examination paper in Comprehensive Field No. 54.061 graded it "unsatisfactory".

Under the rules of the university, Petitioner was permitted to take the examination in Field No. 54.061 a second

time in the Spring of 1968. She did so. The first reader graded her paper "satisfactory"; the second reader "unsatisfactory". A third reader was thereupon assigned by the university to grade the paper. The third reader graded the paper "unsatisfactory".

The grading and comments of the readers are conflicting. If the most favorable grading and comments of all readers as to each question were adopted, Petitioner's paper would have to be graded "satisfactory".

The Respondent University did not undertake any substantive review of Petitioner's examination paper or of the readers grading or comments; or in any manner attempt to ascertain whether the readers accomplished the grading of the paper in accordance with relevant academic standards. In so doing, the Respondent University permitted the readers to reach their grading conclusions in any manner which might be selected by the individual reader, and the system allowed readers to take into consideration whatever factors they might deem important. The Respondent University thereby conferred final authority on the readers to determine Petitioner's entitlement to a Masters Degree. Nothing in the statute creating the Respondent University, nor in its by-laws, rules, or regulations permits delegation of authority to make a final determination as to the entitlement of Petitioner, or of any other candidate for a degree, to the readers of comprehensive examinations.



On or about May 27, 1971, Petitioner instituted suit against the Respondent University in the United States District Court for the District of Columbia, alleging existence of a contractual relationship between Petitioner and the University, and seeking a decree and judgment of specific performance of the contract through conferral upon her of the Respondent University's Degree of Master of Arts in Public Administration, which degree the University had refused to confer upon her. The Complaint (infra, Appendix D) specifically alleged, inter alia, existence of a contractual relationship, performance on Petitioner's part of all prerequisites and corresponding entitlement to award of the Degree, and that the Respondent University's refusal to award the degree was arbitrary, capricious, and an unjustifiable denial of Petitioner's rights under the contract. Additionally, the Complaint alleged arbitrary, capricious and baised action in grading the examination on the part of the two readers who graded the paper "unsatisfactory", and arbitrary and capricious action and abuse of discretion on the Respondent University's part in relying, without review, on the grading of the readers.

Respondent's Answer alleged failure of the Complaint to state a claim upon which relief could be granted; failure of Petitioner to meet the Respondent University's requirements for the Degree because she failed the comprehensive examination; and absence of any damage caused by the university.

During pretrail discovery, the depositions of Harold H. Roth, Lowell H. Hattery, and Fred R. Brown, all of

whom were readers of the comprehensive examination which the Respondent University asserted was not "satisfactorily" accomplished by Petitioner, were taken. In an effort to obtain evidence of the Respondent University's, and readers', arbitrary, capricious and biased action with respect to Petitioner's candidacy for the Masters Degree, and because the readers could not remember, on deposition, whether they had ever previously graded a woman candidate for a Masters Degree in Public Administration or had ever graded any candidate for the degree as "unsatisfactory", Petitioner sought production and copying of the grade sheets for all comprehensive examinations given by the University since 1961, when Petitioner entered the Respondent University's Graduate School of Government and Public Administration. The Respondent University refused to produce the grade sheets. Petitioner moved for an order requiring production. The Respondent University opposed the motion. The assigned pretrial examiner recommended denial of the motion. The Court accepted the recommendation of the pretrial examiner and denied the motion on the grounds that the documents were not relevant and production would be unduly burdensome.

Petitioner thereafter served interrogatories upon the Respondent University requesting, inter alia, information regarding the number of men and women who took comprehensive examinations during the period 1961 through 1970; the number of each who passed; the number of each awarded the degree of Master of Arts in Public Administration; and the number of each who, having received an "unsatisfactory" grade on a comprehensive examination, were

nevertheless awarded the degree and the circumstances thereof. The Respondent University objected to answering the interrogatories. Petitioner moved to compel answers and the University opposed the motion.

Petitioner sought to establish, through the requested documents or the answers to interrogatories or both, and through evidence uncovered as a result of the information obtained thereby, that she had been subjected to arbitrary, capricious, and discriminatory action in denial of a degree, based upon an alleged "failure" of a comprehensive examination, while the same sanction had not been visited on other students who were candidates for the degree of Master of Arts in Public Administration, or at least, any male students.

While Petitioner's Motion to Compel Production of the grade sheets was pending before the Court, and prior to hearing thereon, the Respondent University, on January 28, 1972, moved to dismiss the Complaint or alternatively for Summary Judgment. The Motion alleged, inter alia, failure to state a claim upon which relief could be granted and lack of authority of the Court or any other body to grant the relief requested by Petitioner. The Respondent University did not seek to establish factually that its action was not arbitrary, capricious or biased. Petitioner opposed the Motion, filing in opposition thereto a statement of genuine issues, amongst which, was: "Were two of the three readers biased and prejudiced against the Plaintiff because she was a woman?".

Petitioner's mot ion to compel pro-
duction of the grade sheets was denied by
the Court on March 15, 1972. No decision
on Petitioner's motion to compel answers
to interrogatories was rendered by the
Court. On April 20, 1972, the Court granted
the Respondent University's motion for
summary judgment and denied its motion to
dismiss. In so doing the Court held:

> ". . . that there are no genuine
> issues of fact and that defendant
> [university] did not act arbi-
> trarily, capriciously, or un-
> reasonably in denying the degree
> of Master of Arts in Public Admin-
> istration to plaintiff but exer-
> cised permissible academic judgment
> and discretion."

Thereafter, on May 17, 1972, Petitioner
appealed to the United States Court of
Appeals for the District of Columbia Circuit
from the judgment of the District Court.
Petitioner contended therein that the grant
of summary judgment by the District Court
was erroneous because there were disputed
issues of fact which precluded allowance
of the motion; that the District Court,
in passing on the Respondent University's
motion, resolved disputed factual issues;
and that it granted judgment in favor of
the University although the Respondent
University's entitlement to such judgment
had not been established as a matter of law,
all in contravention of Rule 56(c) of the
Federal Rules of Civil Procedure. Addi-
tionally, Petitioner contended that dis-
allowance of her motion for production
of the grade sheets was erroneous because,
pursuant to Rules 26 and 34 of the Federal
Rules of Civil Procedure, the grade sheets
were relevant to the subject matter of the

action and the Respondent University had not proven that their production would be unduly burdensome.

The Court of Appeals, by judgment rendered on December 10, 1973, affirmed the judgment of the District Court, stating inter alia, that "discrimination" was not raised by the Complaint nor the discovery proceedings and concluding, based thereon, that the District Court did not err in its grant of summary judgment since there were no material issues of fact in dispute with respect to the University's grading procedures or how they were implemented in this case; and that the District Court did not abuse its discretion in denying Petitioner's motion for production of grade sheets since "with no claim of discrimination in the Complaint, the grading sheets for all other students over a ten year period are without apparent relevance." On Petition for Reconsideration, the judgment was affirmed.

ARGUMENT

Reasons For Granting The Writ

1. One of the issues here in question, the proper interpretation of the allegations of Petitioner's Complaint, arises under the language of Rule 8(f) of the Federal Rules of Civil Procedure and decisions rendered by this Court respecting the application to be accorded pleading requirements of the Federal Rules of Civil Procedure. It is Petitioner's contention that the United States Court of Appeals for the District of Columbia Circuit has applied the Federal Rules of Civil Procedure in a manner which conflicts with the intent thereof as announced in applicable decisions of this

Court, thereby warranting review by this Court of the Appellate Court's action.

In Maty v. Gresselli Chemical Company, 1938, 303 U.S. 197, 200, 201, the Court described the function of pleadings in the following terms:

> "Pleadings are intended to serve as a means of arriving at fair and just settlement of controversies between litigants. They should not raise barriers which prevent the accomplishment of that end . . . Proper pleading is important, but its importance consists in its effectiveness as a means to accomplish the end of a just judgment . . .".

In Hickman v. Taylor, 1947, 329 U.S. 495, 500, in comparing previous rules of federal procedure to the new rules, the Court noted:

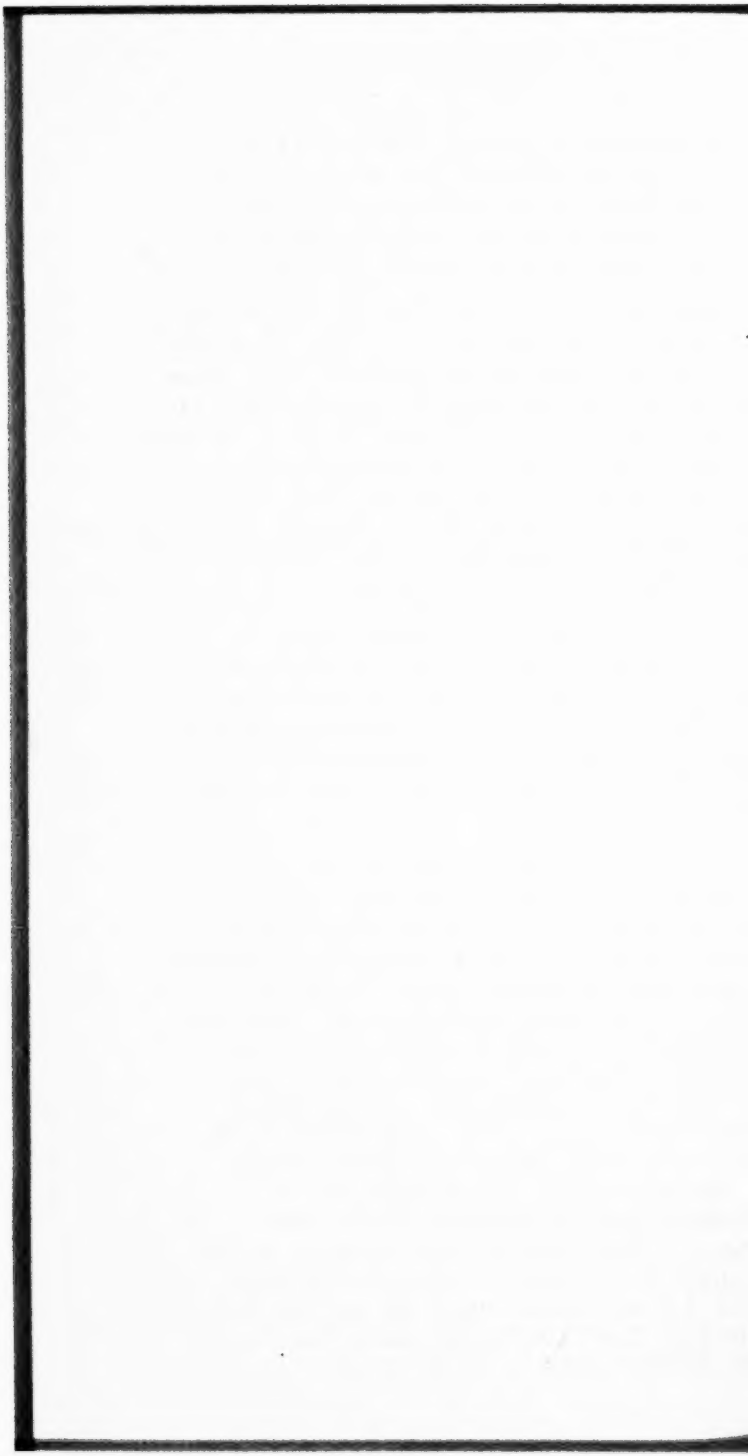
> ". . . under the prior federal practice, the pretrial functions of notice giving, issue-formulation and fact revelation were performed primarily and inadequately by the pleadings. Inquiry into the issues and the facts before trial was narrowly confined and was often cumbersome in method. The new rules, however, restrict the pleading to the task of general notice-giving and invest the deposition-discovery process with a vital role in the preparation for trial. The various instruments of discovery now serve (1) as a device, along with the pre-trial hearing under Rule 16, to narrow and clarify the

> basic issues between the parties, and (2) as a device for ascertaining the facts, or information as to the existence or whereabouts of facts, relative to those issues . . ."

In line with the "notice giving" function intended to be served by the Federal Rules, the Court has held that ". . . the Complaint is to be liberally construed in favor of Plaintiff . . ." and ". . . should not be dismissed unless it appears that [Plaintiff] could 'prove no set of facts in support of his claim which would entitle him to relief'". Jenkins v. McKeither, 395 U.S. 411, 421, 422.

The liberality of construction to be accorded the pleadings is expressly recognized in Rule 8(f) of the Federal Rules of Civil Procedure: "All pleadings shall be so construed as to do substantial justice." As the Court stated in Conley v. Gibson, 355 U.S. 41, 47, 48:

> "All the Rules require is 'a short and plain statement of the claim' that will give the Defendant fair notice of what the Plaintiff's claim is and the grounds upon which it rests . . . Such simplified 'notice pleading' is made possible by the liberal opportunity for discovery and the other pretrial procedures established . . . to disclose more precisely the basis of both claim and defense and to define more narrowly the disputed facts and issues. Following the simple guide of Rule 8(f) that 'all pleadings shall be so construed as to do substantial justice', we have no doubt that Petitioner's Complaint



> adequately set forth a claim and gave the Respondents fair notice of it basis. The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate proper decision on the merits."

In commenting on Rule 8(f), Wright & Miller, Federal Practice and Procedure: Civil §1286 (at pp. 380,381) state:

> "This provision is not simply a precatory statement but reflects one of the basic philosophies of practice under the federal rules. Thus, it is in keeping with and serves to reinforce the general mandate in Rule 1 that the federal rules should be construed to secure the just, speedy, and inexpensive determination of every action and the statement in Rule 8(e)(1) that no technical forms of pleadings are required. Lawsuits should be determined on their merits and according to the dictates of justice, rather than in terms of whether or not the averments in the paper pleading have been artfully drawn." (footnotes omitted. Citing, among other decision, Maty v. Gresselli Chemical Company, supra).

Petitioner respectfully submits that the judgment of the United States Court of Appeals for the District of Columbia Circuit does not comply with these guidelines. Petitioner's Complaint alleged

that the Respondent University's action in denying her its degree was arbitrary, capricious and biased. Although there does not appear to be any decisions rendered by this Court bearing on the question, decisions eminating from state and at least one United States District Court clearly establish that proof of such action is redressable. See, e.g., Connelly v. The University of Vermont and State Agricultural College, 244 F. Supp. 156 (1965). The Court of Appeals, however, concluded that Petitioner's Complaint did not allege "discrimination", and was ". . . unwilling on [the] record to read [Petitioner's] complaint as though it alleged sex discrimination," although there is no intimation in the record that the District Court so viewed the Complaint. The allegations of Petitioner's Complaint would clearly appear to encompass, and thereby allow discovery and presentation of evidence in support of her claim, that Petitioner was denied a degree because she was a female, a denial on such basis obviously constituting arbitrary, capricious and biased action, pursuant to Rule 8(f) and the decisions of this Court heretofore referenced. In fact, Conley v. Gibson, supra, would seem to dictate such result. The Petitioner in Conley had alleged in the Complaint that the Respondent had practiced discrimination. The Respondent argued, unsuccessfully, that specific facts to support the general allegation of discrimination were not set forth. The Respondent University in this case, as with the Respondent in Conley, was sufficiently apprised under "notice-pleading" established by the Federal Rules to enable it to uncover, through discovery proceedings, the underlying basis for the claim. The Appellate

Court was, therefore, unjustified in adopting such a restrictive construction of the Complaint in order that it could affirm the judgment of the District Court and its denial of Petitioner's motion to compel production of grade sheets. Review by this Court of the action of the Appellate Court in so doing should thus be granted.

2. The second issue on which review is requested involves Rule 56 of the Federal Rules of Civil Procedure. If the Court of Appeals properly construed Petitioner's Complaint as not encompassing discrimination, it is Petitioner's contention that the Court of Appeals nevertheless erred in affirming the District Court's grant of summary judgment in Respondent's favor and that the action of the Circuit Court in so doing warrants review by this Court as the effect of the Court's action was to deny to Petitioner her day in Court.

In Fountain v. Filson, 1949, 336 U.S. 681, the Court expressed the view that Rule 56 cannot be expanded beyond the limits therein prescribed, and that summary judgment can be granted only if the test therein is met. Existence of a genuine issue of fact bars grant of summary judgment. United States v. W.T. Grant Co., 1953, 345 U.S. 629. Summary judgment cannot be used to deprive litigants of a full trial of genuine fact issues, and must be denied if there is an issue for trial. Poller v. Columbia Broadcasting System, Inc., 1962, 368 U.S. 464; Sartor v. Arkansas Natural Gas Corp., 1944, 321 U.S. 620.

The party moving for summary judgment has the burden of proving that there is no genuine issue as to any material fact and

that it is entitled to judgment as a matter of law. Adickes v. S. H. Kress & Co., 1970, 398 U.S. 144.

In passing on a motion for summary judgment, the record is to be viewed in the light most favorable to the opposing party, Adickes v. S. H. Kress & Co.; supra, Poller v. Columbia Broadcasting System, Inc., supra, with the party opposing the motion entitled to the benefit of all favorable inferences to be drawn from the underlying facts contained in the record and doubt resolved against the movant. United States v. Diebold, 1962, 369 U.S. 654. Even then, summary judgment is to be cautiously invoked, Associated Press v. United States, 1945, 326 U.S. 1, especially where subjective matters are involved, Poller v. Columbia Broadcasting System, Inc., supra , and should be invoked only when the truth is clear and the case is such as would require a directed verdict. Sartor v. Arkansas Natural Gas Corp., supra.

The foregoing principles were stated by the Court in Poller v. Columbia Broadcasting System, Inc., supra, in the following terms (368 U.S. at 467, 473):

> "Summary judgment should be entered only when the pleadings, depositions, affidavits, and admissions filed in the case 'show that [except as to the amount of damages] there is no genuine issue as to any material fact and that the moving party is entitled to judgment as matter of law'. Rule 56(c), Fed. Rules Civ. Proc. This rule authorizes summary judgment 'only where the moving party is entitled to judgment as a

> matter of law, where it is quite clear what the truth is . . . [and where] no genuine issue remains for trial . . .[for] the purpose of the rule is not to cut litigants off from their right of trial by jury if they really have issues to try' . . .
>
> * * *
>
> "We look at the record on summary judgment in the light most favorable to Poller, the party opposing the motion, and conclude here that it should not have been granted. We believe that summary procedures should be used sparingly in complex antitrust litigations where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot. It is only when the witnesses are present and subject to cross-examination that their credibility and the weight to be given their testimony can be appraised. Trial by affidavit is no substitute for trial by jury which so long has been the hallmark of 'even handed justice'."

If the District Court grants summary judgment where there is an unresolved issue of material fact, the Appellate Court must reverse. Kennedy v. Silas Mason Co., 1948, 334 U.S. 249; Arenas v. United States, 1944, 322 U.S. 419.

The District Court and the Appellate Court failed to properly apply the foregoing rules. Petitioner's Complaint alleged

that the action of the readers in reporting an "unsatisfactory" grade on her comprehensive examination was arbitrary, capricious and biased, and that the University acted arbitrarily and capriciously in accepting the readers' reports as and for a final determination of Petitioner's entitlement to the degree. The Respondent University's motion for summary judgment was supported by excerpts from depositions of the three (3) readers who graded Peitioner's examination paper and of Petitioner. On their face the depositions establish that the readers did not apply uniform standards in grading the papers and were allowed by the University to use whatever standards they deemed appropriate. The depositions failed to establish that the action of the readers and of the Respondent University was not arbitrary, capricious and biased. Rather, the Respondent University's motion addressed itself to the legal question of whether the Court was authorized to grant the requested relief. In opposition to the University's motion, Petitioner noted the following to be the genuine issues of material fact in dispute:

> "1. What were the terms of the contract between the parties as to the award of a degree in Master of Arts in Public Administration to Plaintiff?
>
> "2. Who prepared the original retake examination in Field No. 54.061, Management of the Government Administrative Establishment, and in preparing the same were questions included which were based on materials taught in courses

which Plaintiff did not take under the curriculum specified by the Defendant?

"3. Did the three readers use the same standard of grading the two comprehensive examinations?

"4. Were two of the three readers biased and prejudiced against the Plaintiff because she was a woman?

"5. Was the grading of Plaintiff's comprehensive examination paper arbitrary and capricious in that the readers did not use the same standards; did not grade answers to questions uniformly; and so conducted themselves as to demonstrate that the Plaintiff was entitled to a satisfactory grade on the basis of the relative comments of two readers who graded her unsatisfactory?

"6. Did Defendant breach its contract with Plaintiff by arbitrarily and capriciously accepting the arbitrary and capricious grading of Plaintiff's one remaining examination paper as grounds for refusing to award the Masters Degree to Plaintiff?"

In ruling on the Respondent University's motion, the Court stated:

"Upon consideration of defendant's motion to dismiss and/or motion for summary judgment, statement of material facts as to which there is no genuine dispute, pertinent excerpts from depositions, opposition to the motion and statement of genuine issues, supporting points and authorities, and

> oral argument of counsel, and it appearing to the Court that there are no genuine issues of fact and that defendant did not act arbitrarily, capriciously, or unreasonably in denying the degree of Master of Arts in Public Administration to plaintiff but exercised permissible academic judgment and discretion, it is this 20th day of April, 1972
>
> ORDERED, ADJUDGED and DECREED that defendant's motion for summary judgment be and it hereby is granted and that defendant's alternative motion to dismiss the complaint be and it hereby is denied." (underscoring supplied)

It is clear from the Court's decision that it ruled on disputed factual issues in holding the Respondent University's action not to be arbitrary, capricious or unreasonable. The case was one of first impression in the District of Columbia, although other jurisdictions had previously recognized the validity of a claim based upon arbitrary and capricious denial of a degree. See, e.g., Connelly v. University of Vermont and State Agricultural College, supra. There was no evidence before the Court upon which it could decide that the Respondent University "exercised permissible academic judgment and discretion" because there was no evidence which disclosed the "permissible academic judgment and discretion" with which the Respondent University was vested. Nor did the Respondent University's evidence establish that its action was not arbitrary or capricious. Absence of such proof and existence of disputed factual

issues precluded the grant of summary judgment. Petitioner respectfully submits that the Court's allowance of the Respondent University's motion in the face of such disputed issues contravenes Rule 56(c) of the Federal Rules of Civil Procedure and the foregoing decisions of this Court, and that its action requires review by this Court.

CONCLUSION

It is, therefore, submitted that this Court should grant certorari to consider and review application by the Courts below of Rules 8(f) and 56 (c) of Federal Rules of Civil Procedure, which appear to have been applied in a manner which is in conflict with the meaning and purpose thereof and of the applicable decisions of this Court; the effect of which has been to deny Petitioner her day in court.

Respectfully Submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE
DISTRICT OF COLUMBIA CIRCUIT

No. 72-1565 September Term, 1973

[Entered: December 10, 1973]

Florye M. Heard, :
Appellant

v. : Civil Action 1045-71

The American Univer- :
sity

Appeal from the United States District Court
for the District of Columbia

Before: Bazelon, Chief Judge, McGowan and
MacKinnon, Circuit Judges

JUDGMENT

This cause came on for consideration on the record on appeal from the United States District Court for the District of Columbia and briefs were filed by the parties. On consideration of the foregoing, it is

ORDERED AND ADJUDGED by this Court that the judgment of the District Court appealed from in this cause is hereby affirmed, for the reasons set forth in the attached memorandum.

Per Curiam
For the Court

Hugh E. Kline, Clerk

MEMORANDUM

Appellant, a graduate student at American University, twice failed the comprehensive examinations required to qualify for a master's degree. She brought a suit in the District Court to compel the University to confer the degree upon her, alleging the University had acted arbitrarily and capriciously, and in contravention of her contractual rights. More particularly, the complaint asserted that the grading of her examination had been arbitrary and capricious in that the quality of her answers was not correctly reflected.

The complaint is devoid of any suggestion that discrimination was involved; and the record, made up of the initial discovery proceedings and the papers relating to the University's motion for summary judgment, addresses only the question of the alleged unreasonableness of the grading process. There were, in our view, no material issues of fact in dispute with respect to the University's grading procedures or how they were implemented in this case; and we believe that the District Court did not err in its grant of summary judgment.

Appellant complains in particular of the disallowance by the District Court of her objections to the pretrial examiner's recommended denial of her motion for the production of all grading sheets for comprehensive examinations in the University's School of Government and Public Administration for the years 1961-1970. The District Court was of the view that this request was not only unduly burdensome insofar as the University was concerned, but that it was also irrelevant to the

claims made in the complaint. This matter of compelled production being committed to the discretion of the District Court, we find no abuse. With no claim of discrimination in the complaint, the grading sheets for all other students over a ten-year period are without apparent relevance. 1/ We do not find it necessary, any more than did the District Court, to reach the assertion by the University that these papers are privileged.

1/ The first appearance in the record of a suggestion that discrimination on the basis of sex may have been involved is in the recommendation of the pretrial examiner. There the complaint is erroneously characterized as raising the charge of discrimination based upon sex, in addition to the allegations of arbitrary grading and contract violation. This faulty characterization was used as predicate for the examiner's statement that, to the extent that anti-female bias was involved, all the plaintiff would need would not be the grading papers themselves but only the number of men and women who took the examinations, and how many of each passed and failed. Subsequent to the pretrial examiner's recommendation, appellant submitted a "Statement of Genuine Issues" and a series of interrogatories, both raising the question of sex discrimination. The interrogatories were pending when summary judgment was granted.

We are unwilling on this record to read appellant's complaint as though

it alleged sex discrimination. Since the complaint did not specifically raise the issue, the defendant University never presented evidence in rebuttal. Nothing in our disposition of this case, however, forecloses appellant from subsequently pursuing the issue of sex discrimination in any appropriate forum.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE
DISTRICT OF COLUMBIA CIRCUIT

No. 72-1565 September Term, 1973

[Entered: January ~~14~~ 23, 1974]

Florye M. Heard, Appellant :

: Civil Action 1045-71

v. :

The American University :

Before: Bazelon, Chief Judge, McGowan and MacKinnon, Circuit Judges

O R D E R

On consideration of appellant's petition for rehearing, it is

ORDERED by the Court that appellant's aforesaid petition is denied.

Per Curiam
For the Court

Hugh E. Kline, Clerk

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Entered: April 20, 1972]

FLORYE M. HEARD, Plaintiff	)	
v.	)	Civil Action No. 1045-71
THE AMERICAN UNIVERSITY, Defendant	)	

ORDER

Upon the consideration of defendant's, motion to dismiss and/or motion for summary judgment, statement of material facts as to which there is no genuine dispute, pertinent excerpts from depositions, opposition to the motion and statement of genuine issues supporting points and authorities, and oral argument of counsel, and it appearing to the Court that there are no genuine issues of fact and that defendant did not act arbitrarily, capriciously, or unreasonably in denying the degree of Master of Arts in Public Administration to plaintiff but exercised permissible academic judgment and discretion, it is this 20th day of April, 1972

ORDERED, ADJUDGED and DECREED that defendant's motion for summary judgment be and it hereby is granted and that defendant's alternative motion to dismiss the complaint be and it hereby is denied.

United States District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF COLUMBIA

[Entered: May 27, 1971]

FLORYE M. HEARD 601 19th Street, N.W. Washington, D.C. 20006 Plaintiff,	)	
v.	)	Civil Action No. 1045-71
THE AMERICAN UNIVERSITY Washington, D.C. 20016 Defendant.	)	

COMPLAINT
ACTION FOR SPECIFIC PERFORMANCE OF A CONTRACT TO AWARD A DEGREE OF MASTER OF ARTS IN PUBLIC ADMINISTRATION

1. Plaintiff is a resident of and domiciled in the District of Columbia. Defendant is a corporation, incorporated by Act of Congress; is engaged in providing courses of academic instruction to students admitted to enrollment; and confers various kinds and types of degrees on students who are admitted as candidates for such degrees and complete prescribed courses of study and related prerequisites.

2. This Court has jurisdiction under the provisions of Sections 11-521 and 11-921, D. C. Code, 1961, as amended by Public Law, 91-358, 91st Cong. 2nd Session, 84 Stat. 482, the amount in controversy being in excess of $50,000.

3. In 1961, Plaintiff applied for and was admitted to full standing as a student in Defendant's School of Government and Public Administration with the objective of obtaining the degree of Master of Arts in Public Administration. Thereafter, Plaintiff entered upon a course of study prescribed by Defendant for students seeking the Master of Arts degree in Public Administration.

4. Upon Plaintiff's admission to full standing as a student of Defendant's School of Government and Public Administration, it was agreed, by and between Plaintiff and Defendant, that upon payment of the required tuition and other fees prescribed by the Defendant, and upon completion of the required number of hours of study, Plaintiff would be admitted to candidacy for the degree of Master of Arts in Public Administration. It was further agreed that upon admission to candidacy for the degree of Master of Arts in Public Administration, and upon completion of the total prescribed number of hours of study for such degree, the passing of examinations in required comprehensive fields, and the submission of a thesis or the taking of seminars, the Plaintiff would be awarded the degree of Master of Arts in Public Administration.

5. On June 17, 1966, Plaintiff, having completed the required number of hours for that purpose, was advanced to candidacy for the degree of Master of Arts in Public Administration, with a total hour requirement of thirty (30) hours, including six (6) hours for the thesis or an accepted alternative to the thesis. Three fields for

comprehensive examination were specified. On April 21, 1967, Plaintiff was advised that she would then have two comprehensive examination fields instead of the previous three specified, and that these fields would be 54.061, Management of the Governmental Administrative Establishment and 54.064, Government Financial Policy and Program. She was further advised that the total requirements would continue to be thirty (30) graduate credit hours, including the twenty-one (21) hours then credited on her record and six (6) hours for the Master of Arts thesis.

6. Plaintiff completed the said thirty (30) graduate credit hours of academic instruction, submitted to comprehensive examinations in two (2) comprehensive examination fields, and submitted a Master's thesis which was found to be acceptable subject to passage of the examinations. Plaintiff paid to Defendant, and Defendant accepted and retained, all sums of money to which Defendant became entitled under the agreement aforesaid, and in all other respects performed all of the terms and conditions of said agreement on her part to be performed.

7. Nevertheless, Defendant refuses to recognize Plaintiff's entitlement to the degree of Master of Arts in Public Administration and to confer said degree upon her. The action of Defendant in refusing to recognize Plaintiff's entitlement to the degree and to confer said degree upon her represents arbitrary and capricious action on Defendant's part and constitutes an unjustifiable denial of Plaintiff's rights under the aforesaid

contract, in that:

a. Defendant recognized that Plaintiff had successfully completed thirty (30) graduate credit hours of academic instruction; and that the thesis submitted by Plaintiff was acceptable in satisfaction of the thesis requirement established by Defendant.

b. Defendant submitted Plaintiff's comprehensive examination papers for grading to two readers for each examination. Plaintiff was thereafter advised by Defendant that the two (2) readers grading her examination paper in field 54.066, Government Financial Policy and Program, both graded her paper "satisfactory"; but that the readers grading her examination paper in field 54.061, Management of the Government Administrative Establishment, graded her examination paper as "unsatisfactory". Thereupon, Defendant authorized Plaintiff to retake the examination in field 54.061, Management of the Government Administrative Establishment; it being understood that if her retake examination paper was satisfactory, she would be awarded the degree of Master of Arts in Public Administration.

c. Plaintiff thereupon submitted to a second examination in Management of the Government Administrative Establishment, then designated as field 54.61M, in the Spring of 1968. This examination was also submitted to two readers named by the University for grading the examination. One reader graded the examination "satisfactory", and one reader graded it "unsatisfactory". The paper was then submitted to a third or "referee" reader, who also graded it "unsatisfactory". The

grading by the two readers who found the paper unsatisfactory was arbitrary and capricious, and did not correctly reflect the quality of Plaintiff's answers to the questions which were the subject of the examination. A fair, reasonable and unbiased grading of the examination paper required that it be graded as "satisfactory" by at least two of the three readers. Such a fair, reasonable and unbiased grading would have entitled Plaintiff to the Degree of Master of Arts in Public Administration.

d. Defendant relied on the reports of the two readers, although the unreasonable, unfair and biased nature of the reports was apparent from an examination of the reports and the examination papers. In so doing, Defendant acted arbitrarily and capriciously and in abuse of whatever discretion may have been vested in Defendant under the aforesaid contract to determine Plaintiff's entitlement to the Master's Degree.

8. Plaintiff is a Federal Government employee, holding a position as Contract Specialist with Civil Service status and a present grade of GS13. Plaintiff embarked upon a program of undergraduate and graduate studies while employed as a Contract Specialist, and achieved her present position by reason of her undergraduate work. By reason of Defendant's refusal to award to her a Masters Degree in Public Administration, she has not only lost prestige but has been prevented from advancing her position and her salary. She has been damaged, therefore, in position, prestige and earnings, and only the earnings can be measured mathematically. Her damages in all three areas certainly exceed the sum of $50,000. She has, however, no adequate

remedy at law and can obtain appropriate relief only through specific performance of the contractual obligation of the Defendant to award her the Masters Degree.

WHEREFORE, the premises considered, Plaintiff demands that the Court enter a decree of specific performance requiring Defendant to comply with the contract by conferring upon her the degree of Master of Arts in Public Administration.

Robert Sheriffs Moss Florye M. Heard

DISTRICT OF COLUMBIA: SS

Florye M. Heard, being first duly sworn on oath deposes and says that she is the Plaintiff in the above entitled action; that she has read the foregoing Complaint and knows the contents thereof; and that same is true, excepting as to matters therein alleged on information and belief and that as to those matters she believes it to be true.

Florye M. Heard

Subscribed and sworn to before me this 26th day of May 1971.

Notary Public, D.C.